IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

MOREHOUSE ENTERPRISES, LLC d/b/a BRIDGE CITY ORDNANCE, et al.,	)
Plaintiffs,	) Case No. 3:22-cv-00116-PDW-ARS
v.	)
BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, et al.,	)
Defendants.	)

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM
IN RESPONSE TO ATF'S NOTICE OF AMENDED REGULATION

In a Notice published in the *Federal Register,* with a publication date of today, Monday, August 22, 2022, Defendant ATF has noticed changes[1] to the challenged Final Rule entitled "Definition of 'Frame or Receiver' and Identification of Firearms." The Final Rule was originally published on April 26, 2022, with an effective date of this Wednesday, August 24, 2022, and the noticed changes also have an effective date of August 24, 2022. Plaintiffs' challenge to that rule has been in litigation before this Court since the filing of their Complaint on July 5, 2022.

The changes to the Final Rule are described as "corrections," yet the summary of the changes admits that the complexity of this rulemaking process has caused even the ATF to make numerous mistakes. ATF admits the Final Rule contained inconsistencies, and creates various sources of confusion, which the agency now hopes to have identified and fixed — of course, two

[1] *See* "Definition of 'Frame or Receiver' and Identification of Firearms; Corrections, 87 FR 51249, https://www.federalregister.gov/documents/2022/08/22/2022-17741/definition-of-frame-or-receiver-and-identification-of-firearms-corrections.

days before the effective date of this voluminous rulemaking. *See id*. at 54219 (describing "the complexity of this rulemaking process and the resulting significant number of comments and revisions in response," acknowledging "some technical errors in the regulatory text that" are "causing confusion" and "could create confusion," including "unintentionally broadening [a] requirement" and "potentially creating inconsistencies" and "creating confusion for readers").

Ironically, after repeatedly criticizing Plaintiffs for some alleged "delay" in challenging the Final Rule, ATF has now waited until two days before its effective date to publish changes to its text. Plaintiffs have not had time to review these changes, and their implications, to determine whether they are, in fact, "corrections." Certainly, the agency's last-minute changes provide this Court no opportunity to have a full understanding of the Final Rule before ruling on Plaintiffs' motion seeking injunctive relief. It is important to note that ATF waited 117 days from the date the Final Rule was published to notice these changes.

Significantly, as a purely technical matter, ATF has failed to publish its "corrections" "not less than 30 days before its effective date," as required by the APA. *See* 5 U.S.C. § 553(d). In *United Solid Waste Activities Group v. EPA*, 236 F.3d 749 (D.C. Cir. 2001), the EPA similarly attempted to amend a rule without notice and comment, describing the change as an exercise of an "inherent power" to correct "technical errors." The D.C. Circuit rejected this argument, concluding that it had never recognized an inherent power to ignore the APA's procedural requirements in the rulemaking context to correct errors. *Id*. at 752.

To be sure, there are exceptions to the notice-and-comment requirement "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. 553(b)(3). However, correcting errors does not fall within these

exceptions.[1] *See United Solid Waste* at 753. Furthermore, the ATF did not claim the good cause exception in the "corrections," nor did it provide any reasoning that would justify application of the good cause exception. Similarly, the D.C. Circuit rejected an interim final rule of the EPA when it should have been noticed for comment, even though a final rule was pending: "we strongly reject EPA's claim that the challenged errors are harmless simply because of the pendency of a properly-noticed final rule." *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 95 (D.C. Cir. 2012).

Plaintiffs assert that this last-minute set of changes to the challenged "Final Rule," the publication of which took place without Defendant providing any notice thereof to Plaintiffs or to the Court, provides yet another reason for the Court to enjoin, stay, or otherwise delay implementation of the Final Rule, in order to give the Court the time it needs to properly consider the pending motion and the Final Rule, as now amended.

Dated: August 22, 2022

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[1] Recently, a Supreme Court dissent noted that, "[a]lthough this Court has never precisely defined what an agency must do to demonstrate good cause, federal courts have consistently held that exceptions to notice-and-comment must be "'**narrowly construed and only reluctantly countenanced**.'" *Mack Trucks, Inc. v. EPA*, 682 F. 3d 87, 93, 401 U.S. App. D.C. 194 (CADC 2012) (quoting *Utility Solid Waste Activities Group v. EPA*, 236 F. 3d 749, 754, 344 U.S. App. D.C. 382 (CADC 2001)); *see also* C. Koch & R. Murphy, Good Cause for Avoiding Procedures, 1 Admin. L. & Prac. §4:13 (3d ed. 2021)." *Missouri v. Biden*, 142 S. Ct. 647, 659 (2022) (Alito, J., dissenting) (emphasis added).

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* *Application for Admission Forthcoming*

CERTIFICATE OF SERVICE

I Stephen D. Stamboulieh, hereby certify that I have on this day, caused the foregoing document or pleading to be filed with this Court's CM/ECF system, which caused a notice of the filing and a true and correct copy of the same to be delivered to all counsel of record.

Dated: August 22, 2022.

/s/ Stephen D. Stamboulieh
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